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Abstract

The principle of rule of law is not only a normative but also a legal cultural concept[1], so understanding it more or less requires a return to our legal cultural roots. This article offers a glimpse at a Nordic way of understanding the concept of rule of law. I am merely scratching the surface of the Nordic legal thinking, since the Nordic legal literature is influenced by various conceptions of the multidimensional concept of rule of law, which are not all mentioned or analysed in this article. For example, I have intentionally omitted the Nordic discussion concerning the question, how one should understand rule of law in the framework of Nordic welfare state.[2] The emphasis is on the Finnish sources, which may at least to a certain extent illustrate the Nordic legal systems in general.

In Finland the interpretation of the rule of law principle has been characterized by the comparison especially to the Anglo-American concept of Rule of Law and the German Rechtsstaat concept.[3] At

[1] See *Tuori, Kaarlo*: Oikeuden ratio ja voluntas, WSOYpro, Helsinki, 2007, p. 222, (*Tuori* 2007) and *Tuori*, *Kaarlo*: Ratio and Voluntas, Ashgate, 2011, p. 208, (*Tuori* 2011). Tuori has somewhat similarly separated the Constitution into explicit, written norms and constitutional culture, which refers to constitutional theories, concepts and principles, as well as ways of dealing with these, i.e. patterns of constitutional argumentation. *Kaarlo Tuori* is the still active and influential Emeritus Professor of Legal Theory at Helsinki University.

[2] See about the rule of law and welfare state e.g. *Tuori, Kaarlo*: Oikeus, valta ja demokratia, Lakimiesliiton kustannus, Helsinki, 1990, *Dalberg-Larsen, Jorgen*: Retstaten, velfaerdstaten og hvad så ?, Kobenhavn 1984, or *Asmussen, Ida Helene*: Fra Retstat til Omsorgsstat, DjØf Forlag, Kobenhavn, 2014.This discussion was especially topical in the 1970s and 1980s in Nordic countries. However, it seems to be topical in the context of contemporary EU law, which can be illustrated by referring to *Trstenjak, Verica*: The Welfare State in Times of Crisis: Threat to the Rule of Law?, in *Ilopoulos-Strangas, Julia* (ed.): Die Zukunft des Sozialen Rechtsstaates in Europa, Nomos, 2015, s. 299-306.

[3] See, for example, *Jyränki, Antero*: Presidentti, Tutkimus valtionpäämiehen asemasta Suomessa v. 1919-1976, Suomalaisen lakimiesyhdistyksen julkaisuja, A-sarja No 123, Vammala, 1978, pp. 41-42, *Tuori, Kaarlo*: Oikeusvaltiokäsite – vielä kerran, teoksessa Foucault'n oikeus, Kirjoituksia oikeudesta ja sen tutkimisesta, WSOY, Vantaa, 2002, pp. 49-65, (Tuori 2002), *Raitio, Juha*: The Principle of Legal Certainty in EC Law, Kluwer Academic

times, also the ideals of the French Revolution, Montesquieu's separation of powers principle and the principle of legality have been referred to when giving background to the principle of rule of law.[4] *Recently, the principle of rule of law has also been considered from the global trade and comparative law viewpoint.*[5] *Yet, there is still reason to study the rule of law from a Nordic point of view, since I argue that it contains a material element. This is a controversial statement even in Nordic countries, since academic debate has risen on to what extent the concept of rule of law can be interpreted as having a certain kind of material content.*

Indeed, the bone of contention in academic discussion still seems to be the question of the relationship between democracy and the rule of law. Can the rule of law exist, for example, if the only requirement for the rule of law is a stable market and predictable norms in a society, whereupon it does not matter how the norms have originated and what their content is? Discussion on the rule of law is a cultural issue. With regard to the Western concept of rule of law, like Jyränki I believe it is essential to emphasize that the fields of application for the democracy principle and the principle of rule of law "overlap", i.e. merge in certain sections, even though the concepts carry a different meaning.[6] *In addition to the question of the material content, the question is also to what extent the concept of rule of law is examined as a supranational legal cultural concept from the viewpoint of comparative law, and to what extent we want to give weight to the EU legal concept of rule of law on the national level. The aim is to analyse these topical questions with regard to the European Union from a Nordic viewpoint. This is relevant*

Publishers: Dordrecht, 2003, pp. 134-146, (*Raitio* 2003) and *Tuori* 2007, pp. 221-247. *Antero Jyränki* is Emeritus Professor of Constitutional law at Turku University.

[4] See, for example, *Jyränki, Antero*: Oikeusvaltio ja demokratia, in Aulis Aarnio and Timo Uusitupa (eds.).: Oikeusvaltio, Lakimiesliiton kustannus, Helsinki, 2002, pp. 13-26, (*Jyränki* 2002). According to him, French physiocrats, for example, strived for the rule of law in the 1700s, already before the French Revolution. Famously, Montesquieu in his work *'Esprit des Lois'* (The Spirit of Laws, 1748) laid a basis for the development of the rule of law, especially with the elevation of the principle of legality. The idea of the rule of law was a reaction to an arbitrary and unanticipated administration and application of law.

[5] See *Husa, Jaakko*: Nordic Law and Development – See No Evil, Hear No Evil?, Scandinavian Studies in Law, Vol. 60, 2015, (*Husa* 2015), pp. 1-16. *Jaakko Husa* is currently Professor of Legal Culture and Legal Linguistics at Lapland University.

[6] See *Jyränki* 2002, pp. 24-25. For example, Jyränki mentions the use of an Act of Parliament, which is related to democracy as part of the democratic legitimation chain of the exercise of power and to the rule of law as a basic requirement for restricting individual freedom.

bearing in mind the various tensions especially between the European Union and Poland, which are at least partly connected to the way of understanding the meaning of the rule of law concept.[7]

1. Does the concept of rule of law have any material content in the Nordic countries?

Based on legal literature, the content of the concept of rule of law seems to be contested, especially with regard to how the material dimension of the concept of rule of law should be regarded. In Sweden, Frändberg has described the concept of rule of law as a "rhetorical balloon" that one can, in a way, fill up, including in it everything possible that is felt to be positive.[8] In Finland in turn, Tuori has utilized this Frändberg term in different contexts and warned about a conceptual idyll, in which the concept of rule of law contains mutually conflicting principles.[9] This observation assumes significance, for example, by referring to the German Third Reich's "National Socialist rule of law", in which the concept of rule of law was given material and political content in a way that is far from the democratic rule of law ideal.[10]

According to my interpretation, in his works Tuori has strived to avoid defining material content for the concept of rule of law. An example of this is Tuori's recently presented definition of the concept of rule of law in the European Union context, in which he emphasizes protecting the powers of the Member States, the principle of legality and accountability, i.e. the responsibility for and controllability of the exercise of power.[11] Instead, the democratic rule of law outlined at the time for a nation state context seems for him to be the concept pair that ensures individual legal protection and ensures the material competence of law through human and fundamental rights.

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[7] See e.g. Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, OJ, No L 217, 12.8.2016, pp. 53-68, (C/2016/5703) or

[8] See *Frändberg, Åke*: Begreppet rättsstat, in Sterzel, Fredrik (ed.): Rättsstaten – rätt, politik, moral, Göteborg, 1996, 1996, pp. 21-41, more closely pp. 22-23, (*Frändberg* 1996). *Åke Frändberg* is Emeritus Professor of Jurisprudence at Uppsala University.

[9] See, for example, *Tuori* 2002, p. 49 and *Tuori* 2007, p. 225.

[10] See *Tuori* 2007, pp. 177-178. Concepts used in constitutional law are time-bound, and Tuori has illustrated this aptly by referring to Carl Schmitt's sociology of concepts.

[11] See *Tuori, Kaarlo*: European Constitutionalism, Cambridge University Press, Cambridge, 2015, p. 214, (*Tuori* 2015), in which these three normative elements are "protection of Member State powers, the principle of legality and accountability". For these, Articles 5(2) and 13(2) TEU can be referred to.

On the other hand, at least in Finland, the concept of rule of law has been presented as also having material content. For example, in 2002, Jyränki presented a very clear analysis of the historical layers of the Finnish concept of rule of law as follows:

1. Public power must be based on law
2. The state is organized by the constitution, to which the entire legal order is returned
3. Individual rights and obligations may be provided for by decisions of only such a body, whose designation everyone can have an equal effect on, in other words, with an Act of Parliament
4. Law is applied to an individual case by independent authorities organized into courts for the purpose of giving legal protection. Everyone is guaranteed access to a court with regard to their own affairs.
5. Basic and Fundamental rights that are binding on all public activities protect the individual's position.

With regard to this division, Jyränki has stated that layers 1-4 are elements of a formal concept of rule of law, whereas layer 5 refers to a material concept of rule of law. However, he notes that loading the concept of rule of law with formal and material elements takes away from its distinctiveness, but sees it nevertheless necessary bearing in mind the prevailing use of language.

It is notable that Jyränki does not mention the democratic rule of law at all in this context.[12] Instead, he leads us to the interpretation of the Finnish concept of rule of law through the Anglo-American concept of rule of law, which, as the common law legal culture, is characterized by the fact that as many societal conflicts as possible can be converted into the form of a court case, and that the law is not perceived primarily as a positive right set by a democratic legislator in a continental European sense.[13] Indeed, in this view, it is essential to separate the *Rechtsstaat* discourse intertwined with the German legal culture[14] from the Anglo-American *rule of law*

[12] See *Jyränki* 2002, pp. 23-24.
[13] Ibid., pp. 21-22.
[14] See, for example, *Tuori, Kaarlo*: Four Models of Rechtsstaat, in *W. Krawietz and G. Henrik von Wright* (eds.): Öffentliche oder Private Moral, Festschift für Ernesto Garzón Valdes, Duncker & Humbold, 1992, p. 451 and *Fernandez Esteban, Maria Luisa*: The Rule of Law in the European Constitution, Kluwer Law International, The Hague, 1999, p. 82, (*Fernandez Esteban* 1999). Tuori has divided the development of the Rechtsstaat concept into four phases, which Fernandez Esteban describes with the terms "liberal, formal, substantial and democratic".

discourse. On the one hand, the Anglo-American concept of rule of law, and on the other hand the increasing importance of fundamental rights and different legal principles in judicial procedures has created discussion on a *State ruled by the Judges* and often in a very negative tone. At the same time, we have been able to establish that legal principles are taking an increasing share from rules in the entity of the legal system, which, for its part, has been seen to be a symptom of the strengthening of the application of law and the science of law in relation to legislation.[15]

In recent years, Hallberg has brought new content to the definition of the concept of rule of law, which cannot be derived from German legal science in the way, for example, the concept of the democratic rule of law can. Hallberg's understanding of the rule of law is dynamic and quite international with regard to its emphases in the sense that he builds his concept of rule of law from the local level to the international level and from there onwards taking into account regional integration and finally globalization. In addition, the citizen's viewpoint and along with it e.g. the emphasis on fundamental and human rights are characteristics of a dynamic and wide-ranging concept of rule of law. In his interpretation of the rule of law, Hallberg refers to the interaction between public administration and civil society, whereupon a discussion on the functionality of social order and citizens' experiences of the realization of justice can be included in the rule of law discourse. He does not emphasize the differences between the Anglo-American concept of *rule of law* and the German *Rechtsstaat* concept, but rather looks for their shared features to form a kind of a synthesis of the modern principle of rule of law in such a way that legality and legitimacy both receive their share in the content of the concept of rule of law.[16] To be exact, Hallberg, according to his own words, has not studied the rule of law as a concept but rather a kind of a development process.[17] And indeed, nowadays in legal studies one tends to study processes such as constitutionalization, Europeanization or globalization.

Hallberg sees that the concept of rule of law has three stages of development. He, also, intertwines the development at the early stage with the fairly formal interpretation of the

[15] See *Tuori* 2007, pp. 249-275. The threat that politically natured powers are transferred to courts, even though in a democratic rule of law they should belong to the Parliament and the government that controls its work and to which it is accountable, is related to juridification.

[16] See *Hallberg, Pekka*: The Rule of Law, Edita, Helsinki, 2004, pp. 5-6 and 11-70, (*Hallberg* 2004). *Pekka Hallberg* is the former president of the Finnish Supreme Administrative Court and the Rule of law has been his main research topic for years.

[17] The interpretation is based on my discussion with Hallberg at the launch of the book "Rule of Law and Sustainable Development" on 25 April 2017 at the University of Helsinki.

"classic" concept of rule of law that emphasizes the principle of legality. He considers the democratic rule of law as the next stage and as the third stage, the concept of rule of law in social dimensions.[18] He emphasizes that one should not adhere to an examination that is too normative when defining the concept of rule of law but rather it is important in the interpretation to take into account the empirical evidence related to the content of the concept of rule of law.[19] This dynamic concept of rule of law can be fleshed out to consist of the following four factors:

1. principle of legality
2. the balanced separation of powers
3. fundamental and human rights
4. Rule of law as a functional entity (functionality)[20]

His interpretation of the concept of rule of law is thus quite broad. He sees that the concept of rule of law is based on a legal context characteristic of each time and place, and that it is discretionary with regard to its content.[21] For that reason, he analyzes the concept of rule of law from many different viewpoints, taking into consideration both national and international influences. Hallberg's interpretation of the concept of rule of law is thus based on a completely different discourse than, for example, Frändberg's.[22]

In Hallberg's interpretation, I think it is quite essential to emphasize its global nature, which becomes apparent especially in contexts concerning the functionality of the rule of law. In the interpretation of modern law, one must take into account the relativized sovereignty of states, which he describes as a transition from political constitutionalism to economic constitutionalism.[23]

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[18] See *Hallberg* 2004, p. 14, where it is stated that the third stage of the concept of rule of law is a kind of social capital as follows: "*In the conclusions of this study, the focus is on the issues concerning the legitimacy of the use of power, the identity of the people and the value judgments of civil society, essentially part of the third layer of rule of law development. The study attempts at outlining a functional model of the rule of law, which can be conceived of a social capital*."

[19] Ibid., 41.

[20] Ibid, p. 6, 57 and 70-90 as well as *Hallberg, Pekka*: Rule of Law, Prospects in Central Asia Rural Areas and Human Problems, Edita, Keuruu, 2016, pp. 136-145, (*Hallberg* 2016). The capacity of the rule of law to operate is related e.g. to obligations to ensure the realization of fundamental and human rights and enable citizens to access their rights without unnecessary delay.

[21] See *Hallberg* 2004, pp. 33-34.

[22] See *Frändberg* 1996, pp. 22-23. Hallberg's interpretation of the concept of rule of law that emphasizes discretion is in clear conflict with Frändberg's quite formal and "neutral" interpretation.

[23] See *Hallberg* 2004, p. 190.

As the role of states has changed along with globalization, according to Hallberg it cannot avoid impacting administrative structures and practices of nation-states and the functioning of the judiciary. At the same time, the impact also extends to the concept of rule of law in such a way that it receives substantive content especially through fundamental and human rights. In this context, privatization of traditional tasks belonging to the state can be seen as a threat to the state's legitimacy, if the principles of good governance and the legal protection of individuals suffer at the same time.[24] Recently, *Judt*, has also criticized the same problem of the weakening state and strengthening markets. According to him, the reality of post-communism created a breeding ground for a fairly weak state, on the one hand in the United States during the reign of the Republicans, and on the other hand in Eastern Europe, where the "minimal state" of the fairly neoliberal economy replaced the strong state.[25]

Examples taken from Jyränki's and Hallberg's works cannot fully answer the question of whether some material content is related to the concept of rule of law specifically in the Nordic countries. This cursory and superficial examination suffices, however, to indicate that academic research concerning the concept of rule of law is out of step specifically with regard to what factors the concept of rule of law can be seen to include. It also seems that how the premises are chosen is central with regard to the interpretation of the concept of rule of law. For example, if the concept of rule of law is derived from German legal science[26] and especially Habermas's legal theory, the emphasis on a democratic rule of law is justified as a conclusion.

On the other hand, if the premise is to remove the concept of rule of law from its German history and connect it to the topical and global development of the rule of law, as Hallberg does, the concept of rule of law will unavoidably have a fairly multidimensional meaning, which also includes material elements. This interpretation is strengthened by the fact that also *Nieminen* in her study on Europeanized constitutional law defines the modern concept of rule of law in such a way that it includes both the formal and material side. With the material or substantive side she above all refers to the requirement of the realization of justice. According to her, we seek justice

[24] Ibid., pp. 195-197 and *Tuori* 2002. S. 62. Tuori has considered privatization and handing over of public tasks to be managed by market mechanisms as a threat to the rule of law.
[25] See *Judt, Tony*: Huonosti käy maan (*Ill fares the land*), Like, Keuruu, 2011, p. 218, (*Judt* 2011). Belief in the self-direction of markets characterized especially the 1990s in Eastern Europe.
[26] See, for example, *Tuori* 2007, p. 185.

by having all of the state bodies separate from each other, exemplifying the separation of powers, and thus bound to ensure the material fundamental rights of citizens.[27]

I think, however, that a very broad and in a way "global" concept of rule of law is open to criticism on several grounds. To wit, especially from the viewpoint of the realization of fundamental and human rights, I am worried if, for example, only the general order and predictable activity of the market can be interpreted as the content of the concept of rule of law and the legitimacy of the political system.[28] Economy and law are so intertwined in the global economy that there are no universal values behind the concept of rule of law.

Husa has illustrated how the principle of rule of law has been utilized in various development projects as a kind of Western export and often finally with fairly poor results. We have been able to commit to projects supporting the rule of law to ensure that we can achieve a "*secure and stable investment climate*".[29] Problems have resulted from the fact that Western industrial countries have not sufficiently understood the creation of the concept of rule of law from the legal cultural level.[30]

For example, China's understanding of rule of law creates an interesting tension in relation to how the principle of rule of law is perceived in Western countries.[31] In China, the law is rather a way to use power ("rule by law" or "governance with law as an instrument of ruling") than a principle limiting the exercise of power and a basis for the legitimacy of power.[32] This concept of *rule by law*

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[27] See *Nieminen, Liisa*: Eurooppalaistuva valtiosääntöoikeus – valtiosääntöistyvä Eurooppa, Suomalaisen lakimiesyhdistyksen julkaisuja, A-sarja No 259, Helsinki, 2004, p. 107, (*Nieminen* 2004). Dr. Nieminen is a prominent Finnish expert in Constitutional and Medical Law.

[28] See *Judt* 2011, p. 219, where Judt emphasizes that a stable authoritarian system is much more desirable for most of its citizens than a failed democratic state. This kind of thinking is quite far from the ideals exemplified by the democratic concept of rule of law.

[29] See *Husa* 2015, p. 8.

[30] Ibid, p. 15.

[31] On China's concept of rule of law, see more specifically *Hallberg, Pekka*: Rule of Law and Sustainable Development, Tallinn, 2017, pp. 62-85, (*Hallberg* 2017). China's concept of rule of law must be seen in its own cultural context. Hallberg describes the Chinese legal culture as follows on page 63: "*Old traditions still have considerable significance in the present legal system of China. To put it briefly, the dominant factor influencing legal thinking is the hierarchical, communal and, hence, family-oriented nature of the system. With respect to politics, it should be noted that the centre of power has been viewed as an integral entity until these days. Consequently, there has been no separation of governance and jurisdiction or legal profession outside the official machinery*".

[32] See *Husa* 2015, pp. 12-13. Husa describes the central importance of a (*virtuous*) leader in legitimizing Chinese exercise of power. One can be virtuous in many different ways, i.e. the yardsticks for virtuousness can be related to religion or to how China's Communist Party defines virtuousness.

is in clear conflict with the Nordic as well as the European concept of *rule of law*. To be sure, one must remember that the Eastern European countries' *rule by law* system did not collapse until the 1990s, although it currently seems like especially Poland and Hungary have partially returned to the old authoritarian administrative culture.[33] During the communist administration, courts were not independent of political exercise of power in the way required by the current European concept of rule of law.[34] Consequently, the concept of rule of law next requires a brief overview of at least the German *Rechtsstaat* concept and the Anglo-American concept of *rule of law*.

1.3. Rechtsstaat and the rule of law

Immanuel Kant's (1724-1804) way of perceiving the relationship between the state and law has at least to some extent been seen as the precursor to theories of rule of law. It has been accepted that Kant's categorical imperative included the idea of the general applicability of norms, as in the *Rechtsstaat* concept, so that they would be equitable at the same time.[35] Kant's categorical imperative is based on a deontological concept of morality. Referring to *Minkkinen*, categorical imperative can be illustrated as follows: "So act that the maxim of your will could always hold at the same time as a principle establishing universal law".[36] This principle is imperative because it obligates and categorical because it does not include any kind of reservation, i.e. it is absolute and unconditional.[37] Therefore, we could hope that a universal law is behind a morally acceptable act

[33] In Poland, the Law and Justice party has enacted legislative changes that questioned the independence of Poland's Constitutional Court. For this reason, the EU introduced the procedure under Article 7 TEU, on which see the commission's recommendation (EU) 2016/1374, delivered on July 27, 2016, on adhering to the principle of rule of law in Poland, EUVL, No L 217,12 August 2016, p. 53-68, (C/2016/5703. In Hungary, for its part, the government led by the Fidesz party caused a stir in spring 2017 by deciding to close down a central university (CEU, Central European University) independent of the political exercise of power through a new Universities Act. In addition, the government of Hungary has already for years weakened the independence of the Constitutional Court and the freedom of the media and the freedom of the civil society.

[34] On Rule by law thought in Eastern Europe see *Sájo, András*: Rule by Law in East Central Europe, in *Gessner, Volkmar – Hoeland, Armin – Varga, Csaba* (eds.): European Legal Cultures, Darthmouth, Aldershot, 1996, pp. 471-473, in which the relationship between law and the state is described as follows: "*Under socialism, the role of law was understood in its relation to the state. Its purpose was to discipline people and create some kind of bureaucratic consistency in the administration of state affairs. Contrary to Weber's bureaucratic law model, this legal system was not predictable; bureaucratic discipline and the rules of jurisdiction served the irrational or only the Party-dictated politically rational decisions at the moment*".

[35] See, for example, *Fernandez Esteban* 1999, p. 81.

[36] See *Minkkinen, Panu*: Järjen lait, Tutkijaliitto, Helsinki, 2002, p. 48 and 62, (*Minkkinen* 2002). On Kant's philosophy, in addition to Minkkinen's work, see more specifically, for example, *Saarinen, Esa*: Länsimaisen filosofian historia huipulta huipulle Sokrateesta Marxiin, yhdeksäs painos, WSOY, Helsinki, 2001, pp. 227-254 (*Saarinen* 2001). *Minkkinen* is currently Professor of Legal Theory at Helsinki University.

[37] See *Saarinen* 2001, p. 247.

and a moral must be adhered to because of itself. According to Kant's view, the law applies to activities, in which the act can impact another's ability to act according to his own will.[38] In law, the will is therefore in opposition to another will. Thus, the law does not, for example, regulate mercy.[39] I find it problematic that the unconditional and strict validity of the categorical imperative remains no matter its consequences in a given situation. At worst, this may open up a possibility of quite a formal legalism that does not take consequences into account.

Kant's moral philosophy was reflected in his political thought in such a way that he required equal treatment of all citizens and respect for individual freedoms. With regard to systems of government, he favored constitutional republicanism and saw that the central task of the state is maintaining order. For Kant, laws reflected the will of the entire community of law, and they were to be enacted in a democratic procedure that guaranteed the rationality of laws.[40] In the 1700s, in addition to Kantian philosophy, concrete reforms, such as the codification of the civil code in 1751 and progress in the supervision of public administration had an impact on the formation of the German *Rechtsstaat* concept.[41]

In his works, Tuori has described the development of the concept of rule of law in Germany in detail.[42] He describes how the early constitutional school of thought during autocracy pondered the relationship between a sovereign monarch and the law and required that the state implement its goals only within the limits of the law and by means of law. The law was seen as an ethical order, independent of the state and sovereignty. This ethical order also justified the inviolable rights belonging to citizens, which were primarily miscellaneous rights to freedom. The task of the rule of law was to ensure this sphere of freedom belonging to individuals. Germany's early constitutional school of thought of the 1800s broke off the connection between democracy and the rule of law and favored a kind of constitutional monarchy, at the same time distancing itself from the principle of the sovereignty of the people during the Enlightenment and through its idealism from Kantianism. A democratic generation of laws was no longer seen as a guarantee for the realization of substantive requirements focused on laws.

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[38] See *Minkkinen* 2002, p. 62 and *Klami, Hannu Tapani*: Sanningen om rätten, Iustus Förlag, Uppsala, 1990, s. 106.
[39] See *Minkkinen* 2002, p. 62.
[40] See *Tuori* 2002, p. 58.
[41] See *Fernandez Esteban* 1999, p. 82.
[42] See *Tuori* 2002, pp. 49-65.

According to Tuori, the next development phase of the *Rechtsstaat* concept began from the constitutional provision for a unified Germany in 1871, and it has been called the late constitutional phase. The state was no longer an ethical organism personified by a monarch, but rather the state was a community of will equivalent to legal entities under civil law, whose feature was sovereignty. At the same time, ethical principles lost their position as limits of the sovereign exercise of power, because the law was equated with a positive law provided by public bodies. Equating the law with legal positivist regulations meant a fairly formal concept of rule of law, from which substantive requirements concerning state activities could no longer be derived. The formal and material side was separated in the law in such a way that laws in the material sense could be introduced only with a formal law or based on the specific mandate of a formal law, which defines the relationship between the legislator and the executive powers.[43] At the same time, the legislative powers were seen to be higher in the hierarchy than the executive and judicial powers. In this context, the study of the exercise of power by a sound administration gained major importance in German legal science in the 1800s.[44]

Since then, the National Socialist legal ideology described the National Socialist rule of law as a state based on justice in a way which distanced itself far from the legal positivist ideals that the late constitutional school of thought had represented.[45] As a matter of fact, my interpretation is that Nazi Germany's legal system cannot be considered a rule of law at all, but rather it could perhaps be described as a kind of version of the *rule by law* system. It is also a distorted image of the law from the viewpoint of legal positivism. The National Socialist law was penetrated by ideology, and laws were interpreted in accordance with their spirit, i.e. from the values of the Nazis. In National Socialism, the sovereign dictator (*Führer*) received his task from the people and then interpreted the will of the people through a kind of existential connection between him and the people.[46] The border between law and politics was blurred, for example, in such a way that the Nazi regime founded the People's Court (*Volksgerichtshof*) in 1934 to handle political crimes as

[43] Ibid., pp. 59-60. All expressions of intention by the state, which had been discussed and published in accordance with the procedural provisions of the Constitution were laws in a formal sense.
[44] Ibid, p. 55 and *Fernandez Esteban* 1999, p. 82. Tuori refers to Thoma's studies on the administration's conformity to law, but like Fernandez Esteban, of the researchers in the 1800s, in addition to Thoma, we can mention *Mohl, Stahl, Gneist, Gerber, Mayer, Laband, Anschuztz* and *Jellinek*.
[45] *See Tuori 2002, pp. 60-61.*
[46] See *Tuori* 2007, p. 180.

a tool of the party. The individual was not at the core of law, but rather the people, which partially explains the human rights violations under the guise of legality, which the National Socialists were guilty of.[47] I therefore do not consider the Nazis' concept of rule of law to be part of the German *Rechtsstaat* concept.

After the Second World War, the German *Rechtsstaat* concept has developed toward emphasizing equality and democracy. One manifestation of this is *Habermas's* argument that the rule of law is possible only as a democratic rule of law.[48] After the war, the *Rechtsstaat* concept has become a concept that emphasizes social fundamental rights rather than a liberal concept that emphasizes individual freedoms. In addition, it has developed more into a substantive than formal principle, according to *Fernandez Esteban*.[49] The legitimacy of modern law can be founded on the process according to which legislative amendments are implemented. In summary, in accordance with modern German legal thought, legislative procedure is regulated in the constitution, power belongs to the people and fundamental and human rights are adhered to in the rule of law. An active civil society, which is able to control the exercise of power by the state, functions in a modern rule of law state.

1.4 Rule of law and the constitutional state

The Anglo-American concept of *rule of law* was also previously fairly formal and legal positivist with regard to its content.[50] For example for *Dicey*, the concept of *rule of law* meant that legislation was given undisputed priority compared to the discretion of the authorities. He also found that in Great Britain, the unwritten Constitution is a result of the rights of private legal entities, which are typically various rights to freedom and whose realization is ensured by courts and whose content they also define with their interpretations in a way characteristic of a *common law* legal system.[51] Dicey's concept of rule of law included the requirement of equality in relation to legislation, which results in the fact that like private individuals, officials also are under the

[47] See more specifically *Lindroos-Hovinheimo, Susanna*: Oikeuden rajoilla, Forum Iuris, 2014, pp. 33-37, (*Lindroos-Hovinheimo* 2014).
[48] See *Tuori* 2002, p. 63.
[49] See *Fernandez Esteban* 1999, p. 86.
[50] See *Raitio* 2003, *pp*. 134-139 ja *Tuori* 2007, pp. 221-229.
[51] On the classic or traditional English concept of rule of law see *Dicey, A.V.*: Introduction to the Study of the Law of the Constitution, Tenth edition, London: Macmillan, 1959, pp. 183-205, (*Dicey* 1959).

jurisdiction of ordinary courts. Indeed, the blurring of the difference between private and public law and preventing administrative arbitrariness is central to Dicey's concept of rule of law.[52] Tuori has aptly pointed out that unlike France, England had no administrative courts, and how Dicey saw that the French administrative court (*droit administratif*) was in conflict with the English concept of *rule of law*.[53]

Like Dicey, *Raz* had a fairly formal understanding of the rule of law. For him, the concept of rule of law was above all related to the principle of legality to law in such a way that legal entities had to adhere to the law and they were to be governed legally.[54] Raz has summarized the factors of the concept of *rule of law* as follows:

1. All laws must be able to be interpreted clearly, created through open procedures and focus their impact on the future.
2. Laws must be relatively stable.
3. The adoption of special laws must comply with open, clear, established and general procedural rules.
4. The independence of the judiciary must be guaranteed.
5. Realization of the principles of natural justice must be guaranteed.
6. Courts must have the power to assess the implementation of principles.
7. Initiation of proceedings in courts should be easy.
8. The discretion of the police and other authorities preventing crimes should not lead to unlawful interpretations of the law.[55]

It would thus seem that a certain material element is related to Raz's concept of the rule of law through principles of natural justice. The interpretation may be contentious, because Tuori, for his part, has found that Raz wants to keep, for example, the requirement of the respect for

[52] See *MacCormick, D. Neil*: Questioning Sovereignty: Law, State and Nation in the European Commonwealth, Oxford: Oxford University Press, 1999, p. 44 (*MacCormick* 1999).
[53] See *Tuori* 2007, p. 227.
[54] See *Raz*, Joseph: The Authority of Law, Essays on Law and Morality, Oxford: Clarendon Press, 1979, p. 212, (*Raz* 1979).
[55] ibid., pp. 214-219.

fundamental and human rights separate from the content of the concept of *rule of law*.[56] Likewise, *Paunio* has described how Raz has further developed a formal line of interpretation by warning, somewhat like Frändberg[57] and Tuori,[58] against including in the concept of *rule of law* a wide range of values, principles or goals that are characteristic of a good legal system.[59] Since then, also *Craig* has adopted a fairly formal concept of *rule of law*. According to him, the concept of *rule of law* is related not only to those procedures with which laws are brought into force but also the clarity of the laws and their being temporally bound.[60]

Brownlie's analysis of the content of the concept of rule of law that was still published at the turn of the century was also fairly formal. He has included as the characteristics of the rule of law the duty of authorities and legal entities to comply strictly with the law, traditional Enlightenment separation of powers between the legislator, courts and executive power, independence of courts and equality of all legal entities with regard to the law. What stands out is that Brownlie seems to emphasize the equality of legal entities far more than fundamental and human rights, for example. For Brownlie, the constitutional exercise of power limits the powers of the government, or on a wider level, the powers of the executive power, in relation to the rights to freedom of private actors, which exemplifies an emphasis on a free market economy typical of the British society.[61]

Even though the formal concept of *rule of law* still has its supporters, Dicey's classic concept of *rule of law* is nevertheless already dated.[62] Legislation, and at the same time the competence of courts, are different today than during his time. For example, *Hood Phillips* already in the 1970s

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[56] See *Tuori* 2007, p. 225, where he states: "Rule of law's requirements were formal for Raz: rule of law was not to be mixed with democracy, justice, equality, human rights or respecting human dignity", on which see *Raz* 1979, p. 211.

[57] See *Frändberg* 1996, pp. 22-23.

[58] See *Tuori* 2002, p. 49, Tuori 2007, p. 225 and *Tuori, Kaarlo*: Ratio and Voluntas: The Tension between Reason and Will in Law, Farnham: Ashgate, 2011, p. 211, (*Tuori 2011*).

[59] See *Paunio, Elina*: Legal Certainty in Multilingual EU Law, Language, Discourse and Reasoning at the European Court of Justice, Farnham: Ashgate, 2013, pp. 54-55, (*Paunio* 2013) and *Raz* 1979, s. 211.

[60] See *Craig, Paul*: Constitutional Foundations, the Rule of Law and Supremacy, Public Law, 2003, pp. 92-111, (*Craig* 2003).

[61] See *Brownlie, Ian*: The Rule of Law in International Affairs. The Hague/London/Boston: Martinus Nijhoff Publishers, 1998, pp. 213-214, (*Brownlie* 1998).

[62] See *Bingham, Tom:* The Rule of Law, Penguin books, London, 2011, pp. 66-67, which has the following apt description: *"A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed*".

proposed that when Great Britain ratified the European Convention on Human Rights in 1951 as part of the concept of *rule of law*, the requirement of the realization of human rights was put forth at the same time. What is essential in Hood Phillips's interpretation is that he did not consider observing the rule of law to be a question that is limited only to an interpretation of national law.[63] Today, courts must also take into account the national (*Human Rights Act 1998*), for observance of the rule of law to be realized.[64] Brexit naturally also means a significant change in relation to what legislation courts in Great Britain will apply in the future. Thus, legislation that is currently in force and independent of Brexit seems to require that the concept of *rule of law* includes substantive law elements.

Collins has already in the 1980s aptly highlighted the impact of various legal theoretical schools of thought on the content of the concept of *Rule of law*.[65] Legal positivists require that the constitutional state strictly adhere to the law in force and emphasize the importance of a linguistic interpretation, i.e. one that relies on the wording of the legislation.[66] On the other hand, researchers known as "idealists" who are primarily bound to a natural justice interpretation tradition perceive the rule of law to also be a principle of substantive law, which aims to ensure the realization of the legal protection of citizens.[67]

Dworkin is a well-known example of researchers, who intertwine the concept of *rule of law* with substantive law content in addition to the aforementioned formal elements through rights belonging to individuals.[68] Dworkin's legal theory gives a basis for seeing that outside a legal

[63] See *Hood Phillips, O.*: Constitutional and Administrative Law, Fifth Edition, Sweet & Maxwell, London, 1973, p. 37, in which he states: "*Nevertheless, there has a been a strong movement since the War – both within the Commonwealth and outside – to define fundamental or human rights, and such definitions or declarations have come to form an important part of a new international concept of "the rule of law*".

[64] See a more specific analysis of this, for example, *Tuori* 2007, pp. 244-245. The Human Rights Act regulates the position of the the European Convention on Human Rights in the national legal system.

[65] See *Collins, Hugh*: Democracy and Adjudication, in *Neil MacCormick* and *Peter Birks* (eds.), The Legal Mind, Essays for Tony Honoré, Clarendon Press, Oxford, 1986, pp. 68-69.

[66] See *Raz* 1979, p. 217, *Hart, H.L.A*: The Concept of Law, Second Edition, Oxford: Clarendon Press, 1997, (first published 1961), pp. 155-184 (*Hart* 1997) and *Weber, Max*: Economy and Law, in *Günther Roth* and *Claus Wittich* (eds.), Economy and Society: An Outline of Interpretative Sociology, Vol. 2, Bedminister Press, New York, 1968, pp. 656-657.

[67] See*. Dworkin, Ronald*: Political Judges and the Rule of Law, The British Academy, London: Oxford University Press, London, 1980, pp. 259-287, (*Dworkin* 1980) and Lyons, David: Ethics and the Rule of Law, Cambridge University Press, Cambridge, 1984, pp. 74-78 (*Lyons* 1984).

[68] See *Craig* 2003, pp. 92-111.

positivist legal interpretation characteristic of, for example, *H.L.A Hart*[69] and *Kelsen*[70], there is also the possibility of a legally sound argumentation. Dworkin's premise was that the weakness of legal positivism was to reject the idea that private legal entities may have rights toward the state already before legislation has been enacted on these rights. In this sense, Dworkin strongly defends individual legal protection against the state.[71] The concept of *rule of law* including material elements that is characteristic of Dworkin has received some support also in continental European research.[72]

1.5 The concept of rule of law in EU law

Already before the principle of rule of law was separately mentioned in the EU Treaty, the European Court of Justice stated already in 1986 in its *Les Verts* judgment that the then European Economic Community is a community of law, because both its Member States and its institutions are under supervision aimed at compatibility between measures implemented by them and the document corresponding to the Constitution, i.e. the EU Treaty.[73] The *Les Verts* case essentially involved the implementation of the requirement for an effective judicial remedy in connection with an action for annulment. It was held in the judgment that the decision by the European Parliament may be appealed despite the fact that the European Parliament was not mentioned in the then Article 173 EC (now Article 263 TFEU) concerning annulment. Rule of law thought is illustrated by the fact that all acts of the then EC institutions that produced legal effects had to be subject to judicial oversight.[74]

Observing the rule of law is also a condition for being a member of the European Union. In 1993, the European Council clarified the conditions that countries seeking EU membership must fulfill. In

[69] See *Hart* 1997, pp. 79-99. H.L.A Hart found that the law consists of valid legal norms that are in force and originated in the legislative process through legal procedures.

[70] See *Kelsen, Hans*: Pure Theory of Law, Berkeley: University of California Press, 1970, pp. 221-222, (*Kelsen* 1970) and *Kelsen, Hans*: Reine Rechtslehre, Wien: Österreichische Staatsdruckerei, 1960, p. 228, (*Kelsen* 1960). In Kelsen's legal theory, legal norms must be separated from moral or religious norms, because the validity of a legal norm may be derived from another superior norm.

[71] See *Dworkin, Ronald*: Taking Rights Seriously, Cambridge: Harvard University Press, 1978, p. xi and xiii from the Introduction, (*Dworkin* 1978). As a matter of fact, Dicey's emphasis that stresses legal protection in the concept of *rule of law* is somewhat similar.

[72] See *Raitio* 2003, pp. 143-144 ja *Hallberg* 2004, p. 15 and 70-90.

[73] See 294/83 Parti écologiste "Les Verts" v. the European Parliament (1986) ECR 1339, para 23.

[74] See, for example, *Joutsamo, Kari – Aalto, Pekka – Kaila, Heidi – Maunu, Antti*: Eurooppaoikeus, Lakimiesliiton kustannus, Helsinki, 2000, p. 89, (*Joutsamo – Aalto- Kaila-Maunu* 2000) and *Hallberg* 2016, pp. 92-93.

accordance with these so-called Copenhagen criteria, all European countries that adhere to the principles of freedom, democracy, human rights, respect for fundamental freedoms and the rule of law may apply for membership.[75] Today, respecting the principle of rule of law as condition for membership is manifested in the Treaty, because in accordance with Article 49 TEU, a European state that respects and promotes values defined in Article 2 TEU can apply for membership to the European Union. It is characteristic of the EU legal concept of rule of law to include, as Article 2 TEU does,[76] democracy, human rights, equality and the concept of rule of law as part of the same entity, which is aptly described by the following quote from the *Kadi* case:

"*It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community*".[77]

Therefore, there are indications in the case law of the Court of Justice of the European Union that the concept of rule of law includes certain material prerequisites for legal decision-making.[78]

In addition, there is reason to highlight the procedure of Article 7 TEU[79] to oversee the integrity of values in accordance with Article 2 TEU from the perspective of EU law and the operating framework of the Commission published in 2014, with which systemic i.e. system-level threats[80] are tackled in the Member States.[81] From a wider European viewpoint, the framework, for its part, is meant to advance the achievement of the goals of the Council of Europe and also take into

[75] See, for example, *Jääskinen, Niilo*: Euroopan unioni, oikeudelliset perusteet, Talentum, Helsinki, 2007, p. 61, (*Jääskinen* 2007).

[76] Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[77] See C-402/05 P and C-415/05 P, *Kadi* and *Al Barakaat*, EU:C:2008:461, para 284 and also correspondingly C-112/00 *Schmidberger,* EU:C:2003:333, para 73.

[78] See 8/55 *Fédéchar* (1955) EU:C:1956:7 and cases related to the concept of rule of law concerning EU law's external liability 5/71 *Schöppenstedt* EU:C:1971:116, 59/72 *Wünsche Handelsgesellschaft* EU:C:1973:86, 20/88 *Roquette frères*, EU:C:1989:221, C-152/88 *Sofrimport*, EU:C:1990:259 and C-282/90 *Vreugdenhill,* EU:C:1992:124.

[79] See, for example, T-337/03 *Bartelli Gálves v. The Commission*, EU:T:2004:106, which concerned the procedure of then Article 7 EU now Article 7 TEU.

[80] See about the concept of systemic deficiency *Von Bogdandy, Armin – Ioannidis, Michael*: Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done, Common Market Law Review 51, 2014, pp. 59-96.

[81] See the Commission's Communication to the European Parliament and Council, A new EU operating framework for strengthening the principle of rule of law, COM (2014) 158 final.

account the expertise and views of the European Commission for Democracy through Law i.e. the so-called Venice Commission on the principle of rule of law. In its report, the Venice Commission lists the following factors included in the concept of rule of law:

-principle of legality, which refers to the transparency, accountability, democratic nature and pluralism of the legislative process
-legal certainty
-prohibition of arbitrariness of the executive powers
-access to justice in independent and impartial courts
-effective judicial review, which includes respect for fundamental and human rights, and
-equality before the law.[82]

The Commission's operating framework and the work of the Venice Commission have not been unimportant, because in January 2016 the Commission began a dialogue with Poland in accordance with the operating framework due to problems related to the position of the Constitutional Court.[83]

A fairly unambiguous interpretation can be read of the Communication concerning the operating framework, according to which in EU law, the rule of law is a constitutional principle formed of factors concerning both form and content.[84] According to the Communication, this means that adhering to the principle of rule of law is essentially connected to the respect for democracy and human rights in such a way that democracy cannot exist and human rights cannot be respected if the principle of rule of law is not adhered to.[85] It is also central to state that the trust of EU citizens and national authorities in the realization of the rule of law in other Member States is important,

[82] See European Commission for Democracy Through Law (Venice Commission), Report on the Rule of Law, Adopted by the Venice Commission at its 86th plenary session, Venice 25-26 March 2011, Strasbourg, 4 April 2011, Study No. 512/2009, CDL-AD (2011)003rev., para 41.
[83] See the Commission's recommendation (EU) 2016/1374, delivered on 27 July 2016, on adhering to the principle of rule of law in Poland, EUVL, No L 217, 12 August 2016, pp. 53-68, (C/2016/5703), which has a reference to the Venice Commission's definition of the principle of rule of law in section 5 of the Introduction.
[84] In support of the interpretation concerning both the formal and material dimension of the concept of rule of law see, for example, C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462, paras 38 and 39 as well as C-402/05 P and C-415/05 P, *Kadi* and *Al Barakaat,* EU:C:2008:461, para 316. A corresponding policy on the substantive and material dimension of the principle of rule of law is also included in the case law of the European Court of Human Rights, on which see Stafford v. the United Kingdom, Judgement of 28 May 2002 (Application no. 46295/99), para 63.
[85] See, for example, *Broekman, Jan M*: The Philosophy of European Union Law, Peeters, Leuven, 1999, p. 205.

so that the EU can act as a "region of freedom, law and security that does not have internal borders".[86] This mutual trust among the Member States has also received an especially prominent role in Opinion 2/13 by the Court of Justice of the European Union.[87] Similarly to the Court of Justice, with regard to the trust among the Member States, we should emphasize that all of the Member States comply with Union law, especially with the fundamental rights recognized in EU law.[88] The concept of rule of law thus receives interpretive content in EU law only in connection to how democracy and fundamental rights are realized and how the Member States can trust each others' legal systems.[89]

As a counter-argument to this contextual and fairly broad interpretation of the concept of rule of law we can return to the argument, according to which the rule of law is in danger of becoming blurred as a concept and losing some of its expressiveness. Thus if the concept of rule of law in a European context can be understood in relation to fundamental and human rights and democracy, then what is the content of its meaning and is the consideration of a material and formal concept of rule of law a relevant question anymore? My interpretation is that the contextual interpretation of the concept of rule of law in relation to, for example, fundamental and human rights, does not exclude assessing what elements constitute the rule of law. As an example, I will present a case law related to discrimination, with which I aim to illustrate the contextuality of the concept of rule of law and its both formal and material dimension.

The Court of Justice of the European Union has stated in the *Mangold* case[90] that the ban against age discrimination is a general principle of law in Member States, but on the other hand it has subsequently in the *Römer* case[91] interpreted that discrimination based on sexual orientation is

[86] See COM (2014) 158 final, para 2,"Why the principle of rule of law is decisively important for the EU".
[87] See Opinion 2/13, Opinion delivered pursuant to Article 218(11) TFEU, EU:C:2014:2454, paras 168,191,192 and 258 and about the concept of mutual trust recent article by *Lenaerts, Koen*: La Vie Après L'Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust, Common Market Law Review 54, 2017, pp. 805-840. The Court of Justice of the EU held that the planned agreement for the EU to join the European Convention on Human Rights is not in conformity with Article 6(2) TFEU or Protocol No. 8 EU, because, for example, it does not prevent the danger that the principle of mutual trust that exists among Member States in EU law can be infringed.
[88] Ibid., para 191.
[89] See e.g. C-404/15 and C-659/15 PPU, *Aranyosi*, EU:C:2016:198, para. 77 about the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of fundamental rights recognized at EU level.
[90] See C-144/04 *Mangold*, EU:C:2005:709.
[91] See C-147/08 *Römer,* EU:C:2011:286.

not a general legal principle. Being interpreted in both cases is Directive 2000/78[92] and the then Article 13 EC ban on discrimination, which now is manifested in Article 19 TFEU.[93] This interpretative set-up raises the question of whether the constitutionally bound bans on discrimination manifested in Article 19 TFEU meant for different groups of people are realized on the same level. That, for its part, is connected to the observation of the rule of law. For example, we can ponder whether equality is realized among different citizens. Discrimination related to age may in principle affect us all over time, whereas discrimination based on sexual orientation will not, which naturally may have political significance in a democracy. If material content is wanted to be permitted for the concept of rule of law, in that case we may interpret that the so-called fundamental rights interpretation of the law, which is not dependent on how large the group being discriminated against is at each time, should be emphasized in the interpretation of different discrimination situations.

The interpretation of the Römer case in relation to the Mangold case may not, however, remain on such a high level of abstraction that we only ponder the weight between different discrimination grounds of Article 19 TFEU. To wit, the interpretation of the Court of Justice of the EU cannot be based on only on material law, but rather the procedural or formal side of the entity must also be taken into account. This took place also in the Römer case, because the Court of Justice of the European Union had to consider whether the examined discrimination situation belongs to the scope of Union law, and what is the significance of the end of the Directive's implementation period with regard to when an individual can have recourse to rights created by the Directive.[94] This dimension, too, connects the concept of rule of law to the example I presented and emphasizes its ambiguity.

1.6 Conclusions on the concept of rule of law

[92] See OJ, No. L 303, 2.12.2000, p. 16.

[93] See also Opinion of Advocate-General Mazák in case C-411/05 *Palacios de la Villa*, EU:C:2007:604, Para. 96. The Advocate-General held that Directive 2000/78/EC and Article 13 EC do not necessarily reflect the idea that all of the discrimination grounds mentioned in the Directive are at the same time general legal principles in EU law. Article 19 TFEU mentions discrimination based on gender, race, ethnic origin, religion or belief, disability, age or sexual orientation.

[94] See C-147/08 *Römer,* EU:C:2011:286, paras 60 and 64 and *Raitio, Juha*: Euroopan unionin oikeus, Talentum pro, Helsinki, 2016, pp. 330-333.

When assessing the interpretations discussed above, we must, like Raz, take into account the momentariness of law and its links to time and place.[95] Tuori, for his part, refers to *Carl Schmitt*, for whom theoretical legal concepts were strongly time-bound in such a way that they exemplify the conceptual perception of their own era.[96] Thus the concept of rule of law has changed over time as the values of the society that is being examined have changed.[97] The same is emphasized by Nieminen, according to whom the content of rule of law has gradually changed as society changes and cannot today be limited only to a nation-state connection.[98]

My own interpretation recommendation for defining the concept of rule of law starts quite pragmatically from the fact that the Member States of the European Union are obligated to take into account the interpretations the concept of rule of law has received within EU law. I believe what is essential is that the EU legal concept of rule of law must be interpreted in close contact with the democracy principle and fundamental and human rights.[99] To wit, the concept of rule of law is an inseparable part of the basic values the EU is based on.[100] In this regard, one should also refer to a report by the so-called Venice Commission concerning the principle of rule of law[101], in which the rule of law is strongly connected to democracy and the demand for the realization of human rights. It is a different matter what is understood in national courts or by authorities about translation versions connected to the own legal culture, examples of which include *rättstatt, Rechtsstaat, État de droit* or *rule of law*. Thus when in the EU the discourse concerning the rule of law cannot be separated from the democracy, separation of powers and legal principles and human rights that legitimize the legal system that create a context for the observation of rule of law, we can present a rhetorical question - is the concept of rule of law a rhetorical balloon after all?

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[95] On the momentarism of law see *Raz, Joseph*: The Concept of a Legal System, Second Edition, Oxford: Clarendon Press, 1980, pp. 34-35, where he describes momentarism as follows: *" A momentary legal system contains all the laws of a system valid at a certain moment. These are usually not all the laws of the system. An English law enacted in 1906 and repealed in 1927 and an English law enacted in 1948 belong to the same legal system. Yet there is no momentary legal system to which both belong, because they were never valid at one and the same moment*."

[96] See *Tuori* 2002, 49-50 and *Schmitt, Carl*: Politische Theologie, Zweite Auflage, Berlin, 1934, p. 59.

[97] See *Siedentop, Larry*: Democracy in Europe, Allen Lane, The Penguin Press, London, 2000, pp. 73-75.

[98] See *Nieminen* 2004, p. 107.

[99] See Article 2 TEU and for example, C-402/05 P and C-415/05 P, *Kadi* and *Al Barakaat,* EU:C:2008:461, para 284.

[100] See *Rosas, Allan – Armati, Lorna*: EU Constitutional Law, An Introduction, Hart Publishing, Oxford, 2010, pp. 41-43.

[101] See European Commission for Democracy Through Law (Venice Commission), Report on the Rule of Law, Adopted by the Venice Commission at its 86th plenary session, Venice 25-26 March 2011, Strasbourg, 4 April 2011, Study No. 512/2009, CDL-AD(2011)003rev.

I do not consider justified the kind of thinking according to which the concept of rule of law is so ambiguous and vague that it has lost its meaning in legal argumentation. Tuori describes this problem with an example presented by *Bingham* about a legal case, whose both parties appeal to the principle of rule of law in such a way that it barely means anything else than "*Hooray for our side*".[102] On the one hand, it is indisputable that the concept of rule of law is ambiguous, but on the other hand I think that a legal interpretation is always contextual in such a way that labelling the concept of rule of law as a rhetorical balloon is hyperbole.

Tuori has also described how Schmitt "neutralized" the concept of rule of law. Schmitt did not want to include material content in the concept of rule of law, because "all kinds of propagandists like to rely on it to denounce their opponent as an enemy of the rule of law".[103] I find that this interpretation originally from the 1930s cannot today be used as a reason to stick to a very formal concept of rule of law.[104] In contemporary legal literature especially in the field of EU law one can refer to the "thick" conception of rule of law, which contains both formal and material elements.[105] The protection of individual rights seems to strengthen the interpretation of "thick" rule of law.[106]

[102] See *Tuori* 2007, pp. 224-225 and *Tuori* 2011, pp. 210-211.

[103] See *Tuori* 2007, p. 177 and *Schmitt, Carl*: Legalität und Legitimität, 4. Auflage, unverändert Nachdruck d. 1932 erschienenen 1. Auflage, Berlin, 1988, p. 19. Schmitt was influential in Nazi Germany and presented, for example, an idea of a National Socialist rule of law, which certainly encourages one to interpret the concept of rule of law in a very formal manner, as Frändberg does, so that the concept of rule of law is not distorted by factors contrary to basic and human rights.

[104] See *Nieminen* 2004. p. 107.

[105] See e.g. *Pech, Laurent*: Promoting the rule of law abroad: on the EU's limited contribution to the shaping of an international understanding of the rule of law, in *Kochenov, Dimitri – Amtenbrink, Fabia*n (eds.): EU's Shaping of the International Legal Order, Cambridge University Press, Cambridge, 2013, s. 108-129, at p. 118: "…*EU publications tend to illustrate a 'substantive/ thick' rather than 'formal/thin' understanding of the rule of law*" or *McCorquodale, Robert*: Defining the International Rule of Law: Defying Gravity?, International & Comparative Law Quarterly, part 2, 2016, pp. 277-304, at pp. 284-285: "*Thus the approach taken in this article is to define the international rule of law in terms of the objectives of a rule of law, and thereby provide a definition appropriate to the distinctive nature of the international system. The definition offered in this article of the international rule of law is a "thick" one and includes the following elements or objectives: legal order and stability; equality of application of the law; protection of human rights; and the settlement of disputes before an independent legal body*" or

[106] See e.g. *Von Bogdandy, Armin – Antpöhler, Carlino – Ioannidis, Michae*l: Protecting EU values, Reverse *Solange* and the Rule of Law Framework, in *Jacab, András – Kochenov, Dimitri* (eds): The Enforcement of EU law and Values, Oxford University Press, Oxford, 2017, pp. 218-233, at p. 226: "*This general orientation towards a "thick" concept of Rule of Law is in principle reaffirmed in the decision to submit Poland to the Framework, which notes that the Rule of Law is a constitutional principle with both formal and substantive components. Nevertheless, when it comes to the actual reprimands against Polish reforms, priority is accorded to the formal dimension*".

The concept of rule of law should be perceived as both a normative and legal cultural concept. The principle of rule of law extends to the deep structure of the law applying the model concerning the levels of Tuori's critical legal positivism.[107] The concept of rule of law represents as one element the values manifested in Article 2 TEU, which the European Union relies on. It would be difficult to oppose the "thick" conception of rule of law in the framework of Nordic countries today. Not only because of the influence of the EU law, but because of the relatively common value basis, since all the Nordic democracies are based on the respect of fundamental rights and on the rule of law. It is interesting, however, that there has been a same kind of academic debate about the material or substantive element in the context of legal certainty as there has been in the context of rule of law in Nordic countries.[108] However, in some recent academic studies the substantive element of legal certainty seems to have been taken for granted.[109] Thus the legal concepts such as the rule of law can indeed vary depending on the time and place and therefore contextual interpretation is to be promoted.

Juha Raitio

[107] See *Tuori, Kaarlo*: Critical Legal Positivism, Ashgate, Aldershot, 2002, pp. 183-196, (*Tuori* 2002).
[108] See e.g. about those, who advocate for a substantive and formal element *Aarnio, Aulis*: The Rational as Reasonable, A Treatise on Legal Justification, Dordrecht/Boston/Lancaster/Tokyo: D.Reidel Publishing Company, 1987, p. 3, *Peczenik, Aleksander*: On Law and Reason, Dordrecht/ Boston/ London: Kluwer Academic Publishers, 1989, p. 401, *Gustafsson, Håkan*: Rättens polyvalens: En rättsvetenskaplig studie av sociala rättigheter och rättssäkerhet, Lund 2002, pp. 1 ff., *Raitio* 2003, pp. 347-387 and *Paunio* 2013, p. 1 ff. A more formal stance can be found in e.g. *Jareborg, Nils*: Straffrättsideologiska fragment, Uppsala: Iustus Förlag, 1992, p. 90, *Asp, Petter*: EG:s Sanktionrätt, ett Straffrättsligt Perspektiv, Uppsala: Iustus Förlag, 1998, pp. 31-37 and *Tuori, Kaarlo*: Om rättssäkerhet och sociala rättigheter (samt mycket annat), Tidskrift för Rättsvitenskapen 3/2003, pp. 360-362.
[109] See e.g. *Vähätalo, Tuukka*: EU-oikeus ja kansallisen tuomion oikeusvoima, in Oikeustiede-Jurisprudentia, Helsinki, 2016, pp. 189-288, at p. 207.